

No. 78-1177

Supreme Court, U. S.

FILED

NOV 27 1979

RICHARD ROBAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

WHITE MOUNTAIN APACHE TRIBE, ET AL., PETITIONERS

v.

ROBERT M. BRACKER, ET AL.

ON WRIT OF CERTIORARI TO THE ARIZONA
COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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OPINIONS BELOW

The opinion of the Arizona Court of Appeals (Pet. App. 24a-33a) is reported at 120 Ariz. 282 and 585 P.2d 891. The judgments of the Arizona Superior Court (Pet. App. 19a-23a) are unreported. The order of the Arizona Supreme Court denying review (Pet. App. 37a) is also unreported.

JURISDICTION

The order and opinion of the Arizona Court of Appeals were entered June 29, 1978 (Pet. App. 24a-

35a). A motion for rehearing was denied by that court on August 28, 1978 (Pet. App. 36a). A petition for review by the Arizona Supreme Court was denied on October 4, 1978 (Pet. App. 37a). The petition for a writ of certiorari was filed on December 29, 1978, and granted on October 1, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

QUESTIONS PRESENTED¹

1. Whether 25 U.S.C. 196, 406, and 407 and 25 C.F.R. Parts 141 and 142, under which Indian reservation timber is comprehensively regulated, preempt the states from taxing the gross receipts of a non-Indian agent of a tribal timber enterprise earned entirely from hauling tribal timber for the Tribe on its reservation on tribal and Bureau of Indian Affairs (BIA) roads.

2. Whether such federal regulation of Indian reservation timber also preempts the states from taxing motor fuel consumption by a non-Indian agent of a tribal timber enterprise used to haul such timber for the Tribe on its reservation on tribal and BIA roads.

3. Whether state taxation of gross receipts of, and motor fuel consumption by, non-Indian agents of a tribal timber enterprise for hauling tribal timber on the reservation on tribal BIA roads as a part of a tribal timber management, harvesting, manufacturing and marketing program infringes on tribal gov-

¹ The statement of the questions presented is taken from the petition for writ of certiorari.

ernment in violation of the doctrine of *Williams v. Lee*, 358 U.S. 217 (1959).

STATEMENT

1. Petitioners are the White Mountain Apache Tribe, a federally recognized Indian tribe, and Pinetop Logging Company, a business enterprise made up of two non-Indian corporations that are organized under the laws of Oregon and authorized to do business in Arizona. They brought this action in state court to challenge the applicability of Arizona's motor carrier license and use fuel taxes to Pinetop's Arizona logging operations, which take place entirely on the White Mountain Apache Reservation. Respondents are the Arizona Highway Department, the Arizona Highway Commission, and individual members of each (Pet. App. 24a-1).²

The Tribe has, under the authority of 25 C.F.R. 141.6 and the Tribal Constitution, and with the approval of the Secretary of the Interior, organized a tribal logging and sawmill enterprise known as the Fort Apache Timber Company (FATCO) to harvest tribal timber, process it, and sell the products (Pet. App. 25a through 25a-1; A. 15). The timber, which grows on tribal lands, is owned by the United States for the benefit of the Tribe (Pet. App. 25a-1). FATCO is the almost exclusive source of the Tribe's

² The First Amended Complaint also named the governor, the attorney general, the state corporation commission, and its members, but those defendants were subsequently dismissed (Pet. 12 n.5).

annual income—providing stumpage payments for timber cut and profits from the sale of products (A. 8-9). FATCO employs a number of the Tribe's members; in 1973 there were about 300 such employees. (A. 8, 15).

FATCO has contracted out to Pinetop and other independent logging companies certain parts of its operation, having found this to be more economical than attempting to conduct the entire operation on its own (A. 12). Pinetop is one of those contractors, and under its contract with FATCO—the terms of which were approved by the BIA—it is authorized to fell and load tribal timber and transport it to FATCO's sawmill in return for monetary compensation specified in the contract (Pet. App. 25a; A. 9-10). In 1974 Pinetop employed about 50 members of the Tribe in its operations (A. 8-9). The activities of FATCO's contract loggers, such as Pinetop, are closely supervised by the BIA through federal regulations (25 C.F.R. Part 141), the contracts it approves, and daily supervision by BIA forestry agents (Pet. App. 25a-1; A. 8, 10, 12-14). Among its regular duties, the BIA "directly selects the trees to be cut, dictates how many trees will be harvested, where logging roads will be built, and how they will be maintained" (Pet. App. 25a-1). The BIA also "controls the type of equipment Pinetop can use to haul lumber, the speeds logging equipment may travel, and the width, length, height, and weight of loads" (*ibid.*).

2. In 1971, the Arizona Highway Department, pursuant to Ariz. Rev. Stat. Ann. § 40-641 (1974) and Ariz. Rev. Stat. Ann. § 28-1552 (Supp. 1978), sought to collect a motor carrier license tax equivalent to 2.5% of Pinetop's gross receipts from its contract carrier operations and an excise tax in the amount of eight cents per gallon of diesel fuel used in Arizona by Pinetop's motor vehicles (Pet. App. 26a).

The motor carrier license tax was imposed on Pinetop because, by virtue of its contract to haul timber for FATCO, it met the statutory definition of "a contract motor carrier of property" (Ariz. Rev. Stat. Ann. § 40-601(A)(7) (1974)); *i.e.*, it was engaged in "the transportation by motor vehicle of property, for compensation, on any public highway," albeit almost exclusively on highways within the White Mountain Apache Reservation that were maintained by the BIA, the Tribe, or the logging contractors themselves (Pet. App. 25a-1; A. 10-11, 12).³

The use fuel tax, levied "[f]or the purpose of partially compensating the state for the use of its highways" (Ariz. Rev. Stat. Ann. § 28-1552 (Supp. 1978)), was imposed on Pinetop because it used diesel fuel for "the propulsion of" the vehicles used in its logging operations "on the highways of [the] state" (§ 28-1552 (2)). Payment of the tax is

³ The term "public highway" is defined as "any public street, alley, road, highway or thoroughfare of any kind used by the public, or open to the use of the public as a matter of right for the purpose of vehicular travel." Ariz. Rev. Stat. Ann. § 40-601(A)(11) (1974).

requested from Pinetop as a user under § 28-1552 (2) rather than from its suppliers as vendors under § 28-1552(1) (Carpenter dep. 89).⁴

3. After Pinetop paid the taxes under protest,⁵ it brought this action in state court for a refund, contending that Pinetop is immune from the motor carrier license tax and the state fuel tax insofar as its hauling activities took place exclusively on tribal and BIA roads within the reservation (Pet. 11).⁶

⁴ "Carpenter dep." refers to the deposition of Leland A. Carpenter, transmitted as part of the record to this Court but not included in the printed appendix to the briefs ("A.").

⁵ Between November 1971 and May 1976 Pinetop paid, under protest, \$19,114.59 in use fuel taxes and \$14,701.42 in motor carrier license taxes, and since that time it has continued to pay additional amounts under protest pending the outcome of this litigation (Pet. 11). The State had previously threatened to collect some \$30,000 for the years 1969-1971, for which it performed an audit, but it finally agreed to postpone collection of the taxes pending the outcome of the litigation (Pet. 13 n.6). In 1973, the State decided, however, to attempt to collect the \$30,000 by levying on Pinetop's equipment (Pet. 13-14 n.6). Petitioners sued state officials in the United States District Court for the District of Arizona (*White Mountain Apache Tribe et al. v. Williams et al.*, No. CIV-73-788-PTC WEC) to enjoin collection of those taxes, and the State is now restrained from collecting them under the terms of a consent preliminary injunction; the federal action has been stayed pending the outcome of the present case (Pet. 14 n.6).

⁶ Pinetop's vehicles travel on state highways when they are first brought to the reservation, and they also travel on state highways in a few locations on the reservation (Pet. App. 25a-1; A. 11-13; Carpenter dep. 24-25). Pinetop has maintained records of the fuel attributable to travel on state highways, and it concedes its liability for the tax attributable to that travel (Pet. App. 25a-1; Pet. 11).

It also contended that, even assuming the State could tax those activities, it was entitled to a "pulpwood exemption" from the motor carrier license tax, pursuant to Ariz. Rev. Stat. Ann. § 40-601(A)(10) (1974). The Tribe subsequently intervened as a plaintiff after having agreed to reimburse Pinetop for the taxes to be paid if Pinetop was unsuccessful in this lawsuit.⁷

The trial court granted summary judgment for the state defendants (Pet. App. 19a-23a), holding that the taxes in question were lawfully imposed on Pinetop and that Pinetop was not entitled to claim the "pulpwood exemption" from the motor carrier license tax.

The Tribe and Pinetop appealed to the Arizona Court of Appeals, which affirmed the trial court's conclusion that Pinetop was subject to the state taxes, but reversed the portion of the trial court's decision holding that Pinetop could not claim the pulpwood exemption, which the appellate court found to be applicable to 60% of Pinetop's gross revenues (Pet. App. 24a-33a). The Arizona Supreme Court declined to review the intermediate appellate court's decision (Pet. App. 37a).

⁷ Petitioners filed an affidavit by the manager of FATCO, stating that when the contract between Pinetop and FATCO was negotiated, the parties believed that Pinetop was not liable for the taxes, and that when the State attempted to levy these taxes, FATCO found it necessary, in order to avoid the loss of Pinetop's services, to agree to reimburse Pinetop for any such taxes it might be required to pay respecting future operations (Pet. App. 26a; A. 11-12).

ARGUMENT

THE STATE MAY NOT VALIDLY IMPOSE ITS MOTOR CARRIER LICENSE TAX OR ITS USE FUEL TAX ON PINETOP'S ON-RESERVATION ACTIVITIES BECAUSE SUCH TAXATION IS PRE-EMPTED BY PERVASIVE FEDERAL REGULATION OF THOSE ACTIVITIES AND CONSTITUTES AN INFRINGEMENT OF TRIBAL SELF-GOVERNMENT

A. Introduction And Summary

All of the activities to which the state taxes at issue in this case apply have taken place within the confines of the White Mountain Apache Reservation: the reservation is the site of the logging and hauling that produce the income and consume the diesel fuel on which the State seeks to impose those taxes. The court below considered this fact of no significance because Pinetop is a non-Indian business (Pet. App. 28a).

We recognize, of course, that a state's power to tax or otherwise regulate activities occurring within its borders does not automatically terminate at the boundary of an Indian reservation, and that a state's interest in regulating the activities of non-Indians has, in particular circumstances, been found sufficient to warrant the exercise of its authority with respect to on-reservation activities. See, e.g., *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 481-483 (1976); *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946); *Utah & Northern Ry. v. Fisher*, 116 U.S. 28 (1885). We find nothing in the decisions of

this Court, however, that compels the conclusion that a state may, in all circumstances, tax or regulate the activities of non-Indians occurring on a reservation. Indeed, this Court's decision in *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965), is authority expressly to the contrary; and it summarizes the principles which distinguish those situations in which a state is free to tax or regulate activities notwithstanding their reservation locus from those in which the state's interest is out-weighted by the more substantial interests of the federal government or the tribe concerned, or both.

In *Warren Trading Post*, this Court held that the State of Arizona was not free to impose a two percent tax on a federally licensed non-Indian trading company's sales to Indians through a retail trading post located on a reservation. The Court found that comprehensive federal regulation of traders left "no room" for state laws "imposing additional burdens" upon them (*id.* at 690) and that the state tax—whether it fell on the trader or directly on the Indians with whom the trader dealt—could frustrate the congressional purpose of protecting Indians against unfair or unreasonable prices (*id.* at 691). Under familiar principles of federal preemption, that particular exercise of the State's taxing power accordingly had to yield.⁸

⁸ A state law is preempted where either Congress has occupied the field with respect to the subject matter the state law seeks to regulate or the state law conflicts with federal law. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-158 (1978); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-526 (1977). A

But, as this Court subsequently pointed out (*McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 170 n.6 (1973)), federal preemption was not the only basis for the holding in *Warren Trading Post*. That decision also stressed that the Navajos had long been "largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities." *Warren Trading Post*, *supra*, 380 U.S. at 690. This invocation of the tradition of Indian independence made it clear that tribal sovereignty remained an interest to be considered when weighing a state's claim that it is entitled to subject to its laws a particular activity occurring within reservation boundaries. That interest had been defined in *Williams v. Lee*, 358 U.S. 217, 220 (1959), as the right, "absent governing Acts of Congress," to be free of state action that "infringe[s] on the right of reservation Indians to make their own laws and be ruled by them." Accord, *Fisher v. District Court*, 424 U.S. 382, 386 (1976); *McClanahan v. Arizona State Tax Commission*, *supra*, 411 U.S. at 171.

These separate grounds for the holding in *Warren Trading Post*—federal preemption and protection against infringement of tribal self-government—both

conflict may be found both where it is impossible for a person to comply with both state and federal law and where the state law simply "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ray v. Atlantic Richfield Co.*, *supra*, 435 U.S. at 158, quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

support our contention in this case that the State is not free to levy its motor carrier license tax and its use fuel tax in connection with Pinetop's reservation operations, at least where travel over state-maintained roads is not involved. Those distinct rationales coincide in this case, however, because as we show below, pervasive federal regulation of the entire timber enterprise, through statutes, regulations, BIA-approved contracts, and daily supervision of Pinetop's activities by BIA agents, reflects in part a congressional purpose of encouraging the economic self-sufficiency of Indian tribes as a means of strengthening tribal government. The intrusion of the State's taxing power into the federal scheme, we submit, frustrates congressional objectives when it threatens the economic base for tribal self-government and the residual authority of the Tribe over its own territory.

B. Federal Preemption

1. The Statutory Background

Although it is not subject to the licensing requirements applicable to the trader in *Warren Trading Post*,⁹ Pinetop is engaged in selling to Indians on a reservation. It sells its services to FATCO, a tribal enterprise, under authority of the functional equivalent of a federal license: its series of contracts with

⁹ References to "goods" in statutory provisions and regulations governing licensed Indian traders (see, e.g., 25 U.S.C. 264; 25 C.F.R. 251.3, 251.6), and the commonly accepted meaning of the term "trader," make it clear that sales of services are not governed by these provisions.

FATCO, each of them approved—and even to a considerable extent drafted (A. 14)—by BIA agents.¹⁰

The activities involved in the operation of a timber enterprise on an Indian reservation are as comprehensively regulated by the federal government as is the business of trading on an Indian reservation. In regulating those timber activities, the Secretary of the Interior is carrying out the intent of Congress—evidenced in statutes relating directly to timber harvesting—of seeing that timber on tribal lands is harvested according to proper forest management principles and sold in a manner that benefits the tribes concerned. But he is also implementing the broader congressional policy of fostering Indian economic self-sufficiency—itself embodied in a number of statutes.

a. Federal policies respecting timber on tribal lands have evolved. Once upon a time, the position was that Indians had no beneficial rights in such timber. Today, the government recognizes an obligation to regulate the harvesting of timber to assure that timber lands will continue to provide a source of economic support for the tribes.

¹⁰ The fact that the sale is to a tribal business that could itself be taxed if it operated outside of the reservation (*Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973)) is not a significant distinction. Individual members of tribes can themselves be taxed on income they earn as citizens living and working beyond the reservation boundaries. *Id.* at 148-149.

In *United States v. Cook*, 84 U.S. (17 Wall.) 168 (1872), and in *Pine River Logging Co. v. United States*, 186 U.S. 279 (1902), this Court held that, under the then-existing statutory scheme regulating the use of Indian land, individual Indians had no right to sell living timber on reservation lands unless the sale was incidental to the improvement of the land—for example, clearing for cultivation. Through misinterpretation of these decisions, the administrative agencies of the government, both the Department of Justice and the Department of the Interior, ruled that Indians had no right to reservation timber and that where reservation timber had been cut by trespassers, the timber should be sold by the General Land Office and the proceeds from the sale credited to the government absolutely, rather than to a tribal trust account. See, e.g., 19 Op. Att'y Gen. 194 (1888); 19 Op. Att'y Gen. 710 (1890).

Well before the fallacy of these interpretations was exposed in *Shoshone Indians v. United States*, 85 Ct. Cl. 331 (1937), aff'd, 304 U.S. 111 (1938), Congress overturned the rulings by the Act of June 25, 1910, ch. 431, 36 Stat. 855, revising the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388. In Sections 7 and 8 of the 1910 Act, 36 Stat. 857, (current versions at 25 U.S.C. 407 and 406(a), respectively), Congress provided for the sale of timber from allotted and unallotted Indian lands for the benefit of

Indians. Section 8 authorized an allottee, with the consent of the Secretary to sell timber from his allotment, the proceeds to go to the benefit of the allottee under regulations to be prescribed by the Secretary. Section 7 provided for the sale of living and dead timber on unallotted lands under regulations to be issued by the Secretary, with the proceeds to be used "for the benefit of the Indians on the reservation" in such manner as the Secretary might direct. (By the Act of April 30, 1904, Pub. L. No. 88-301, 78 Stat. 186, Congress amended 25 U.S.C. 406 and 407 to include the requirement that timber be harvested in accordance with the principle of sustained-yield management.) These provisions of the 1904 Act were enacted at the request of the Secretary, who had pointed out in a letter to the House of Representatives that if timber could be cut from unallotted Indians lands, "it would furnish employment to Indians who now are unable to find work [and] * * * funds for tribal uses which could take the place of funds that must now be appropriated from the Treasury for their support." H.R. Rep. No. 1135, 61st Cong. 2d Sess. 3 (1910).¹¹

¹¹ This echoed an earlier House Report on the bill enacted as the Act of March 28, 1904, ch. 111, 35 Stat. 51, a bill concerning the harvesting of timber on the Menominee Reservation. The House Committee noted that the establishment of sawmills on the reservation would provide year-round employment and that the Indians, under federal supervision, could manage and harvest the lands so as to enjoy dependable income from a continuous supply of timber. H.R. Rep. No. 1086, 60th Cong., 1st Sess. 1-2 (1908). See also S. Rep. No. 110, 60th Cong., 1st Sess. 2 (1908).

b. In 1934, the opportunities for Indian tribes to use the timber on their lands as a source of economic support for their members were enhanced by the enactment of the Indian Reorganization Act (the Wheeler Act), 25 U.S.C. 461 *et seq.* This statute manifested a sharp change of direction in federal policy toward the Indians, replacing the bias of the Indian General Allotment Act toward encouraging Indians to become individual farmers and landowners with measures to assist Indians in reviving their tribal organizations. The new policy was a response to unfortunate consequences of the Indian General Allotment Act: increasingly larger numbers of impoverished Indians stripped of some of their most productive lands—lands that were the most promising basis for a viable tribal economy. See S. Rep. No. 1080, 73d Cong., 2d Sess. (1934); Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. Rev. 535, 536 and nn. 7 & 8 (1975).

In the Reorganization Act, Congress prohibited further allotment of Indian land (Section 2, 25 U.S.C. 462), provided for acquisition by the government of lands or rights in land for the use of the tribes (Sections 5 and 7, 25 U.S.C. 465 and 467), mandated exemption of such lands and rights in land from state taxation (Section 5, 25 U.S.C. 465), provided for tribal constitutions (Section 16, 25 U.S.C. 476), enabled tribes to form themselves into corporations with federal financial assistance (Sections 9 and 17, 25 U.S.C. 469 and 477), and authorized the Secretary to make loans to Indian corporations "for the pur-

pose of promoting the economic development of * * * tribes and their members" (Section 10, 25 U.S.C. 470). In Section 6 of the Indian Reorganization Act, 25 U.S.C. 466, Congress directed the Secretary to make rules and regulations for the management "of Indian forestry units on the principle of sustained-yield management."

As this Court has suggested in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973), the thrust of the Act as a whole was to encourage tribes "to revitalize their self-government," to take control of their "business and economic affairs," and to assure a solid territorial base by "put[ting] a halt to the loss of tribal lands through allotment."

The provisions of the Indian Reorganization Act survived the 1950's, when federal policy, embodied in the Termination Acts and Public Law No. 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588), moved away from the emphasis on strengthening tribal autonomy toward a goal of assimilating the Indians into the general society. See generally, *Menominee Tribe v. United States*, 391 U.S. 404 (1968); Goldberg, *supra*, 22 U.C.L.A. L. Rev. at 536. And, more recently, Congress has returned to the approach of the Indian Reorganization Act. In such measures as the Indian Financing Act of 1974, 25 U.S.C. 1451, *et seq.*, and the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450, *et seq.*, and in the provisions of the Indian Civil Rights Act of 1968 prohibiting further state assumptions of jurisdiction except with tribal consent (25 U.S.C. 1321-1322), Congress has attempted to assure the viability of

tribal government in the face of both economic and political challenges.

c. With regard to the management of timber on tribal lands, the Secretary of the Interior has promulgated regulations (25 C.F.R. Part 141) under authority of some of the statutes discussed above—regulations that reflect the general legislative policy of protecting forest lands and, at the same time, encouraging tribal economic self-sufficiency.¹² The regulations provide for two distinct methods of sale of timber. The tribe can offer its timber for sale, through advertisement and bid procedures, to a non-Indian timber company. See 25 C.F.R. 141.8, 141.10-14. Or the tribe can establish logging and sawmill enterprises to undertake the harvest of timber and its conversion into marketable lumber. 25 C.F.R. 141.6. If a tribal enterprise is established, the tribe can sell the timber to the enterprise without the necessity of advertisement or a formal contract, although the stumpage rates are set by the Secretary. Obviously, a tribal enterprise—which sells processed lumber rather than standing timber—holds out the promise of a greater economic return for the tribe.

Whether a tribe chooses to sell to a non-Indian logger or to establish a logging and milling enter-

¹² 25 C.F.R. Part 142 prescribes terms and conditions for the sale of products produced by tribal enterprises from the tribal timber. Those regulations do not, in all cases, apply to sales by Indian enterprises "that have entered into approved agreements" under 25 C.F.R. 141.6 (see 25 C.F.R. 142.3), and it is not clear from the record whether they would apply to sales of lumber by FATCO.

prise itself, the timber harvesting operations are conducted pursuant to a management plan prepared by the BIA (25 C.F.R. 141.4), which incorporates the objectives for the management of unallotted Indian forest lands set out in 25 C.F.R. 141.3. Those objectives include preservation of Indian forest lands "in a perpetually productive state" (25 C.F.R. 141.3(a)(1)) and "[t]he development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities" (25 C.F.R. 141.3(a)(3)).

The BIA works toward these ends not only through its management plans, but also through its review and approval of contracts such as those entered into by FATCO and Pinetop, and through daily supervision by BIA agents of the logging and hauling. As authorized by 25 U.S.C. 407 and 413, and 25 C.F.R. 141.18, the BIA usually deducts from the gross proceeds of the sale of timber a reasonable fee for its costs of managing and protecting the forest lands and administering sales. The fee is normally 10% of the gross proceeds, although no more than 5% will be charged "when the timber is sold in such a manner that little administrative expense" is required (25 C.F.R. 141.18).

d. Federal regulations with respect to roads on Indian reservations (see 25 C.F.R. Part 162) also govern aspects of the operation of a tribal timber enterprise, since felling trees and hauling the timber to the sawmill involve heavy use of reservation roads, with attendant maintenance expense, and sometimes require the construction of new logging roads in re-

mote areas. The Commissioner of Indian Affairs is authorized to enter into agreements with Indian tribes and with individual States for the construction and maintenance of reservation roads (25 C.F.R. 162.6 and 162.7). When he enters into a construction and maintenance agreement with a tribe that requires contributions from tribal funds, however, the regulations require that he assure that the tribe is "able to make such contributions without undue impairment of the necessary tribal functions" (25 C.F.R. 162.6a).

2. *Obstruction of the Federal Scheme*

The BIA agents, FATCO, and Pinetop work together to operate the tribal timber enterprise within the statutory and administrative framework described above. Pinetop's contracts with FATCO, approved by the BIA, define many other terms of the relationship. We believe that here, as in *Warren Trading Post, supra*, federal regulation of the area leaves "no room" for the "additional burdens" (380 U.S. at 690) imposed by the State. Nor is it simply a matter of federal "occupation of the field." The imposition of these taxes has the potential to frustrate congressional objectives respecting such enterprises.

a. As noted, Congress has provided that "reasonable fees" for services furnished the Indians by the federal government may be collected by the Secretary from the proceeds of sales (25 U.S.C. 407 and 413), and it is the duty of the Secretary to determine

an appropriate fee for such services (see 25 C.F.R. 141.18). In setting these fees, in determining stumpage rates for the timber to be paid to the Tribe, and in reviewing and approving the terms of agreements with contractors like Pinetop, the Secretary—acting through the BIA—can assure that congressional policies respecting the use of tribal timber are carried out. For example, it is for the BIA, in consultation with FATCO, to determine what standards to apply in selecting contractors to carry out functions in the tribal timber enterprise—in Pinetop's case, to engage in its business of logging and hauling on the reservation. Similarly, the BIA, FATCO, and the contractor must decide how to allow for operational costs, such as fuel costs, in calculating the contract price and how to deal with the matter of road maintenance required by the logging and hauling operations—whether the expense of such maintenance will be borne by the tribe directly, by the BIA, or by the contractor. As the record shows, the roads used in the operation are mostly those built and maintained by the Tribe and the BIA, but Pinetop constructs some logging roads, and both Pinetop and FATCO are charged with the costs of repairing roads in proportion to their respective uses of the roads (A. 10, 13; Carpenter dep. 71).

The Secretary must make all of these determinations in a way that will serve the congressional purposes respecting Indian tribal timber enterprises. The imposition of the “additional burdens” of the State's motor carrier license tax and use fuel tax on

Pinetop's gross income from its logging and hauling and the fuel it consumes in driving over the non-state roads has no place in this federal scheme.¹³

¹³ In the Arizona Court of Appeals, respondents argued that Congress had indicated its intent to permit such taxes in the Buck Act, 4 U.S.C. 105-110, a statute permitting the States to levy sales or use taxes within “Federal” areas. This Court, however, held in *Warren Trading Post, supra*, 380 U.S. at 691 n.18, that the Buck Act does not apply to Indian reservations. It noted further that even if it did apply generally, nothing in the Act suggested that Congress had “meant to give States new power to tax federally licensed Indian traders.” *Ibid.*

In the Arizona Superior Court (but not in the Arizona Court of Appeals), respondents, in making their use tax argument, relied on 4 U.S.C. 104, a provision authorizing states to levy certain types of taxes on motor fuel, including taxes “measured by * * * use,” where the fuel is “sold by or through post exchanges, ship service stores, commissaries, filling stations, licensed traders, or other similar agencies, located on United States military and other reservations, when such fuels are not for the exclusive use of the United States.” (Despite this literal limitation to sales on a reservation, the statute has been construed to cover use taxes on withdrawal of motor fuel from storage on a federal reservation, where sale of the fuel has not been taxed by the States. *Matter of State Motor Fuel Tax Liability of A.G.E. Corp.*, 273 N.W. 2d 737 (S. Dak. 1978); *Sanders v. Oklahoma Tax Commission*, 169 P.2d 748 (Okla.), cert. denied, 329 U.S. 780 (1946)).

The original version of this provision was enacted in 1936 as Section 10 of the Hayden-Cartwright Act, ch. 582, 49 Stat. 1521-1522; and it was amended by Section 7 of the Buck Act in 1940, ch. 787, 54 Stat. 1060-1061. While it is possible that this statute could apply in some circumstances to fuel used or sold on Indian reservations (see *Matter of State Motor Fuel Tax Liability of A.G.E. Corp.*, *supra*; *Application of Federal and State Sales Taxes to Activities of Menominee Indian Mills*, 57 Interior Dec. 129, 137-141 (1940)), its general application cannot be assumed where an Indian reservation is con-

b. The court below gave two reasons for dismissing this burden as without significance. First (Pet. App. 30a), it cited decisions of this Court in inter-governmental tax immunity cases declining to invalidate State taxes which, although ostensibly imposed on private parties, in effect fall upon the federal government by increasing its costs. *E.g.*, *United States v. City of Detroit*, 355 U.S. 466, 469 (1958). But this is no answer to the question whether Congress has created a legislative scheme that could be disrupted by the imposition of unanticipated taxes on a private contractor in a manner that will necessarily reduce the profitability of the tribal timber enterprise. Indeed, the same argument could have been made with respect to the tax involved in *Warren Trading Post*.

cerned, given the principle that federal tax laws are not to be lightly read as abridging Indian tax immunities. See *Bryan v. Itasca County*, 426 U.S. 373, 392-393 (1976); *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956). Applying the provision here would in no way serve the purpose of the Hayden-Cartwright Act, which was enacted to assist the states in their highway building programs by providing federal matching funds. Section 10 was added to the bill as a floor amendment by Senator Hayden, who indicated that it would end an unfair practice of motorists who used state highways but escaped the State's gasoline taxes by purchasing their fuel on federal reservations. 80 Cong. Rec. 6913 (1936). See *Minnesota v. Keeley*, 126 F.2d 863, 864-865 (8th Cir. 1942). Here, of course, Pinetop has agreed to pay the tax respecting travel on roads built and maintained by the State, and the State seeks taxes attributable to travel on roads for which the Tribe or the BIA or Pinetop have borne the maintenance or construction costs.

Second, the court (Pet. App. 30a-2) described the taxes as amounting to about \$9,000 and suggested that they were de minimis when compared with the Tribe's annual "net revenues * * * exceed[ing] \$1,500,000 per year" (Pet. App. 30a-2). In fact, there is no clear basis in the record for this calculation of the amount of the taxes imposed on Pinetop. Furthermore, Pinetop was only one of six logging contractors working in the timber enterprise (A. 11-12), and the taxes would presumably apply to all. Finally, the State sets its tax rates and determines the type of income and fuel use to which they will apply without considering the impact this will have on the Tribe, FATCO, or any of FATCO's contractors. Thus, whether tribal resources are abundant or meager, and regardless of how serious their impact on the success of the timber operation, the State would presumably seek to collect whatever taxes it determined were owing. The State has no duty to assure that the timber enterprise will function in a manner that will bring the Tribe closer to economic self-sufficiency. The Secretary does have such a duty, however, and his performance of his task clearly may be obstructed by the intrusion of this State taxation system.

c. In addition to representing an economic burden with the potential for disrupting the congressional scheme respecting tribal timber enterprises, the State's assertion of its taxing authority over activities occurring solely within the reservation treats the reservation boundary as having no greater significance than the boundary of a suburban shopping mall. This

implicitly denies the Tribe's status as "a separate people," occupying at least "a semi-independent position." *McClanahan v. Arizona State Tax Commission*, *supra*, 411 U.S. at 173, quoting *United States v. Kagama*, 118 U.S. 375, 381-382 (1886). It is, moreover, at odds with the congressional policy of revitalizing tribal self-government and, with it, some measure of tribal authority over the territory occupied by those that have maintained the tribal relation. Because this aspect of the State's action may be characterized as an infringement on tribal self-government, and hence an independent ground for holding that these taxes may not be imposed with respect to Pinetop's work on the reservation (see pages 8-9, *supra*), we address it separately in the following section.

C. Infringement Of Tribal Self-Government

In imposing its motor carrier license tax on the income from Pinetop's reservation hauling operations, the State is, in the words of the Arizona Court of Appeals (Pet. App. 28a-1), imposing "a tax on the privilege of doing business in [the] state." More precisely, however, the State is imposing its tax on Pinetop for the privilege of doing business on the Tribe's reservation. Similarly, while the State levies its use fuel tax "[f]or the purpose of partially compensating the state for the use of its highways" (Ariz. Rev. Stat. Ann. § 28-1552 (Supp. 1978)) and applies the tax to fuel "used in the propulsion of a motor vehicle on any highway within the state" (*ibid.*), it is, in more precise terms, taxing fuel

used in the propulsion of motor vehicles on roads within the reservation built and maintained by the Tribe, by the BIA or—under the terms of its contract with the tribal enterprise—by Pinetop.

The State, of course, would not undertake to charge motor carriers for the privilege of doing business in neighboring States, nor does it purport to tax the consumption of fuel on public highways in other States. Indeed, the statutory presumption that fuel placed in the tanks of motor vehicles will be "consumed in propelling the vehicle on the highways of this state" (Ariz. Rev. Stat. Ann. § 28-1556 (Supp. 1978)) may be rebutted by a showing that the fuel was not so consumed (§ 28-1551(10)). And where a motor carrier operates "partly within and partly without" the State, it pays the motor carrier license tax only on the gross receipts from its intra-state business and on that proportion of its remaining gross receipts equal to the proportion of its "mileage within the state" relative to "the entire mileage over which business is done" (§ 40-641(B) (1974)).

We do not, of course, suggest that the sovereignty of a tribe is identical to that of a state. But certainly where the state has no special interest in the particular matter involved, the state's assertion of power should yield. The State's only discernible interests here are a general desire to augment its revenues and a specific aim of recovering from the users of state highways some of the expenses of their construction and maintenance. Were the first interest

deemed sufficient, states would be free to tax on-reservation activities with impunity so long as they avoided the appearance of imposing a tax directly on a tribe, its members, or a tribal alter ego such as FATCO. The second interest is not vindicated by collecting the taxes at issue here because, as we have noted (page 6, note 6, *supra*), Pinetop is resisting the payment only of taxes related to travel over roads maintained by the Tribe, the BIA, or by Pinetop itself.

These taxes thus resemble the state fishing license requirement struck down in *Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm'n*, 588 F.2d 75 (4th Cir. 1978), petition for cert. pending, No. 78-1653, insofar as it applied to fishermen (including non-Indian fishermen) on the Band's reservation. There, after noting that the reservation streams were stocked by the federal government as an aid to a commercial fishing venture that "bolster[ed] the Band's economic well-being" (*id.* at 78), the court noted that North Carolina had, in contrast to the tribe, "no perceivable interest in reservation fishing" (*ibid.*). In that case, as in this, even granting that a state may in some circumstances have an interest warranting an extension of its licensing and taxing powers to activities of non-Indians on an Indian reservation, the State's interest is simply insufficient to warrant the intrusion, particularly where it threatens the economic base that sustains tribal self-government.

Finally, this is not a case in which the party on which the tax ostensibly falls can be said to have located its operations on the reservation in an effort to evade taxes it would otherwise be required to pay. Pinetop is engaged in hauling timber and burning fuel on the reservation because that is where the tribal timber and the tribal sawmill are located and because the terms on which Pinetop has agreed to furnish its services to FATCO are consistent with federal policies relating to tribal timber enterprises. Pinetop's activities there impose no burden on the State for which the State could justly look for recompense.

CONCLUSION

The judgment of the Arizona Court of Appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1979